No. 17-586

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY SUPPORTING JURISDICTIONAL STATEMENT

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

Page

I. This Court has jurisdiction to review the district court's order. 1

II. The Legislature did not engage in intentional discrimination when it enacted the court-ordered plan as its own. 3

III. Districts 27 and 35 were not infected with any discriminatory "taint." 8

A. There was no vote dilution in CD27. 8

B. CD35 was not racially gerrymandered. 11

Conclusion 13

TABLE OF AUTHORITES

Cases:

Bartlett v. Strickland,
556 U.S. 1 (2009) 11

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 10, 12

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 2

Cooper v. Harris,
137 S. Ct. 1455 (2017) 2

Gunn v. Univ. Comm. to End the War in Viet Nam, 399 U.S. 383 (1970) 2

Hunter v. Underwood,
471 U.S. 222 (1985) 7

Johnson v. De Grandy,
512 U.S. 997 (1994) 10

Cases—Continued:

LULAC v. Perry,
548 U.S. 399 (2006) 9, 10
Miller v. Johnson,
515 U.S. 900 (1995) 8, 11
Perry v. Perez,
565 U.S. 388 (2012) (per curiam) 4, 5
Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 8
Thornburg v. Gingles,
478 U.S. 30 (1986) 12

Statutes:

28 U.S.C.
§1253 2
§1292(a)(1) 2

The plaintiffs' effort to repackage the district court's decision only highlights the district court's grave legal and factual errors. This Court should deny the plaintiffs' motion and note probable jurisdiction or summarily reverse.

I. This Court Has Jurisdiction to Review the District Court's Order.

The plaintiffs do not seriously dispute that the district court's order invalidating Plan C235 had the practical effect of precluding its use in the 2018 elections. Nor could they, as the district court held that CD27 and CD35 "violate § 2 and the Fourteenth Amendment," and that those violations "must be remedied." J.S. App. 118a. It made clear that if the Legislature did not immediately redraw the districts, the court would—and would do so in time for the 2018 elections. After all, the court would not have needed to put the Governor on a 72-hour deadline and otherwise rush to redraw the map if it had not already determined that the existing map could not be used in 2018. Indeed, the plaintiffs themselves implicitly concede that the State has been enjoined from using Plan C235 by urging this Court to "remand to the district court in time for implementation of a remedy for the 2018 election cycle." Mot. 4.

The plaintiffs nonetheless claim that this Court lacks jurisdiction because the district court has not yet issued a replacement for the map it enjoined. The plaintiffs confuse whether the court's order is its final order in the case with whether it is an injunction. An injunction does not have to definitively resolve the case; it just has to prevent the appealing party from doing some-

thing.[1] That, the district court's order plainly does. Unlike *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970) (cited at Mot. 16), there is no question what "was to be enjoined" or "against whom" the injunction would run, *id.* at 388. The district court's order is clear: it prevents Texas from using Plan C235 in the 2018 elections because the court found that CD27 and CD35 violate the Constitution.

This Court routinely reviews orders blocking a State from using its existing districts. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Gill v. Whitford*, No. 16-1161 (U.S.). That review is consistent with this Court's longstanding view that appellate jurisdiction over injunctions turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). That *Carson* interpreted §1292(a)(1), rather than §1253, does not matter. Because §1292(a)(1) and §1253 use materially identical language to vest jurisdiction over "orders" "granting" an "injunction," *Carson*'s reasoning applies to both. This is especially so given that *both* provisions—not just §1292(a)(1), *see* Mot. 17—are interpreted narrowly. *See Carson*, 450 U.S. at 84 ("[W]e have construed the statute narrowly."). Far from expanding *Carson*, then, requiring magic words under §1253 would

---

[1] The plaintiffs' argument that "a request for submission of proposed remedial plans," is not an appealable order, Mot. 18, makes the same mistake. Of course that would not typically be an appealable order, because it would be neither a final order *nor an injunction*.

artificially restrict *Carson* and the jurisdiction that Congress has conferred on this Court.

II. The 2013 Legislature Did Not Engage in Intentional Discrimination When It Enacted the Court-Ordered Plan as Its Own.

On the merits, the plaintiffs attack a strawman. They repeatedly insist that the 2013 Legislature's decision to enact the district court's remedial map did not "immunize" Plan C235 from judicial review. Defendants have never suggested otherwise. Defendants have argued only that the 2013 Legislature's decision to repeal the 2011 map and replace it with the district court's remedial map is the relevant decision for purposes of determining the Legislature's intent. And the 2013 decision was exactly what it purported to be: a good-faith effort to comply with the Constitution and the VRA, bring costly and protracted litigation over the 2011 map to an end, and establish permanent congressional districts for the decade. The plaintiffs' fabricated tale of nefarious intent has no basis in reality, and it willfully ignores the Legislature's good-faith effort to address the potential infirmities that the district court had identified.

To be sure, when the Legislature adopted the court-imposed plan as its own, it certainly "assumed the risk" that districts in Plan C235 "might not withstand full scrutiny," Mot. 23, on claims *against that plan*, and the district court was free to consider such claims. But Article III did not permit the court to hold onto moot claims against the never-implemented 2011 plan in an effort to give the plaintiffs an advantage in their attack

on the 2013 plan. J.S. App. 348a (Smith, J., dissenting) ("Article III contains no exception . . . that allows us to resurrect dead claims in order to make it easier for plaintiffs to pursue live ones."). Indeed, the plaintiffs notably do not even respond to defendants' argument that the district court's adjudication of the moot challenges to the 2011 plan was an impermissible advisory opinion. In all events, nothing in this Court's precedents permitted the district court to hold the 2013 Legislature responsible for wrongs that it believed (albeit erroneously) the 2011 Legislature committed.

The plaintiffs' contrary contentions are a study in revisionist history. They first attempt to avoid the district court's incredible conclusion that the Legislature engaged in intentional discrimination by adopting *the court's own remedial map* by claiming that the 2013 Legislature "simply repeal[ed] and reenact[ed]" the map enacted by the 2011 Legislature. Mot. 19-20. That contention blinks reality. The 2013 Legislature repealed the 2011 map and replaced it with a new remedial map imposed by the district court and designed to remedy identified problems and comply with the VRA, the Constitution, and this Court's instructions in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam). That court-ordered remedial map preserved some of the lines from the 2011 plan, but it also substantially amended that plan in many respects. And it altered and preserved lines in accordance with this Court's mandate to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* The 2013 Legislature thus no more

"simply repeal[ed] and reenact[ed]" the 2011 plan than the district court did when it imposed Plan C235.

The plaintiffs' effort to recast the Legislature's adoption of the court-ordered remedial plan as a sinister plot to discriminate against minority voters likewise has no basis in reality. Following this Court's mandate to "draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, the district court did not redraw CD27 because it concluded that it likely did not intentionally dilute minority voting strength and did not redraw CD35 because it concluded that it likely was not a racial gerrymander. *See* J.S. App. at 408a-415a, 417a-423a. And the 2013 Legislature embraced Plan C235 as its own precisely because the district court had concluded that Plan C235 likely complied with the Constitution and the VRA. To be sure, that determination was a preliminary one and did not render the 2013 map immune from challenge. But the district court's preliminary assessment certainly gave the Legislature a good-faith basis to believe that adopting Plan C235 as its own would achieve compliance with the Constitution and the VRA.

That is particularly true given that the legal standards applied by the district court were more generous to plaintiffs than the requirements for a final judgment. To the extent it considered intentional-discrimination claims under VRA §5, the court applied a permissive "not insubstantial" standard. J.S. App. 396a. The remaining claims were considered under the standard for preliminary injunctions, J.S. App. 415a, 423a, which requires only a showing that the plaintiff is *likely* to suc-

ceed, not that it will actually do so. The Legislature thus adopted Plan C235 only after the district court determined that plaintiffs' challenges to CD27 and CD35 did not even meet those lenient standards. If repealing a challenged redistricting plan and replacing it with a remedial map imposed by the very court presiding over the redistricting litigation—after the court concludes that challenges to that map are unlikely to succeed—is evidence of intentional discrimination, it is hard to imagine what a State could ever do to avoid an intentional-discrimination charge.

Rather than answer that question, the plaintiffs insist that the 2013 Legislature adopted Plan C235 in a sinister effort to "insulate" its map from judicial review. If all plaintiffs mean is that the Legislature adopted the Court's remedial plan with the modest hope of ending the litigation and maximizing its chances of complying with the VRA and Constitution, then they are correct. But there is nothing sinister about that. To the extent plaintiffs mean that the Legislature asserted immunity from judicial review, that is just not true. Of course courts may review the districts for discriminatory effects, and of course courts may review the actions of the 2013 Legislature for discriminatory purpose. But what courts may not do is ignore the distinct intent behind the 2013 enactment and charge the *2013* Legislature with discriminatory intent for failure to "cure" the purported discriminatory intent of the *2011* Legislature, as discriminatory *intent* does not carry over from one law to another.

Hunter v. Underwood, 471 U.S. 222 (1985), does not suggest otherwise. *Hunter* did not involve a legislature's adoption of a court-ordered remedy, let alone such an act taken after that court issued an opinion explaining how the court-ordered remedy complied with all applicable federal law. Indeed, *Hunter* did not involve the adoption of new legislation at all. *Hunter* merely considered whether the passage of time removed the original discriminatory intent behind a state constitutional provision that had been in effect for 80 years and concededly "was motivated by a desire to discriminate against blacks on account of race." *Id.* at 233.

It is thus absurd for plaintiffs to claim this case is "indistinguishable" from *Hunter*. Mot. 22. Rather than rely on the passage of time to alleviate the alleged discriminatory intent behind the 2011 plan, the 2013 Legislature passed new legislation: It repealed the 2011 plan before it took effect and adopted the district court's remedial plan in its place. Far from supporting the plaintiffs' claim that the 2011 Legislature's intent could nonetheless doom Plan C235, *Hunter* expressly *reserved* the question of whether the same law "would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. And here, the Legislature did not even reenact the same law, but enacted a different law that fixed all the problems a federal court had identified with the previous legislation. *Hunter* has nothing to say about that scenario.

At bottom, the plaintiffs' defense of the district court's order has no basis in law or fact. When the 2013 Legislature adopted the court's remedial plan, it had

every reason to believe that the plan complied with the Constitution and the VRA. After all, the district court itself had concluded that the plan likely did, and that was the best legal advice the Legislature could hope for. The plaintiffs' baseless attempt to impugn the Legislature's motives is irreconcilable with "the presumption of good faith that must be accorded legislative enactments," and the courts' duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The plaintiffs' claims fail even without that presumption, but they certainly cannot succeed in the face of it.

III. Districts 27 and 35 Were Not Infected With Any Discriminatory "Taint."

Even assuming the 2011 Legislature's intent were relevant to the plaintiffs' challenges to the 2013 map, the plaintiffs' arguments fail on their own terms because the 2011 versions of Districts 27 and 35 were not infected with any discriminatory "taint."

A. There Was No Vote Dilution in CD27.

This Court has long held that a discriminatory-purpose finding requires evidence that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It is therefore legal error to base a finding of discriminatory intent on the legislature's mere "awareness of consequences." *Id.*

That is exactly what the district court did in finding that the Legislature's awareness that some Hispanic voters would reside in a Republican-leaning congressional district sufficed to establish intentional racial discrimination. Indeed, the only factual finding the plaintiffs cite—that "more than 200,000 Latinos in Nueces County 'who had been in an opportunity district were no longer in such a district,'" Mot. 24 (quoting Supp.App. 299a-300a)—is quintessential evidence of mere awareness. If that alone sufficed to establish discriminatory intent, then a State would effectively be required to retain all previously existing minority-opportunity districts—a requirement found nowhere in the Constitution or VRA §2.

In any event, CD27 resulted from race-neutral considerations. As Judge Smith explained in dissent, "Blake Farenthold, an Anglo Republican, was a[] surprise winner in the 2010 Republican sweep," and so "[t]he Republican legislature set out to protect him." J.S. App. 356a (Smith, J., dissenting). The permissible desire to protect an incumbent—not race—therefore "drove the decisions made . . . in Nueces County and throughout CD27." J.S. App. 351a. The plaintiffs cannot transform that decision into a race-based decision by substituting "Anglo-preferred" for "incumbent." Mot. 2.

Nor does the evidence support a finding of discriminatory effect. The plaintiffs ignore black-letter law that establishing a vote-dilution claim "requires the possibility of creating more than the existing number of" minority-opportunity districts—the first *Gingles* requirement. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) (quot-

ing *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). If no such possibility exists, there is no VRA §2 right to remedy; the State may exercise its judgment to draw district lines. *Id.* at 429-30. That is precisely what the Legislature did here: it drew the maximum number (seven) of minority-opportunity districts, recognizing that some minorities (here, Nueces County Hispanics) would not be in a minority-opportunity district. That is perfectly legitimate under VRA §2 and this Court's precedents. Since Nueces County Hispanics are not sufficiently numerous to form a majority, they too suffer from "the absence of [a] critical *Gingles* factor." Mot. 2.

The plaintiffs contend that they nonetheless suffer vote-dilution because the State "engineered a trade that took § 2 rights from those having them [in Nueces County] and gave those § 2 rights to those who did not have them [in CD35]." Mot. 32. This strained analogy to *LULAC v. Perry* is unfounded. In *LULAC*, the State attempted to compensate for the elimination of a compact minority-opportunity district with a district that lacked a reasonably compact minority population, *LULAC*, 548 U.S. at 433-35. Here, there is no dispute that CD35 provides a compact minority group the opportunity to elect candidates of its choice.

Even if some *part* of CD35 does not demonstrate racial bloc voting, it does not follow that the Legislature was forbidden to draw the district, much less that it was obligated to keep Nueces County in CD27. "The ultimate object of the inquiry . . . is . . . the district as a whole." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017).

B. CD35 Was Not Racially Gerrymandered.

The plaintiffs' argument that the 2013 Legislature racially gerrymandered CD35, Mot. 27, suffers from several serious flaws. First, the plaintiffs' contention that motive is irrelevant to a racial gerrymandering claim is plainly wrong. To be sure, racial gerrymandering need not be the product of invidious discrimination. But it must still be the product of *intentional* sorting of voters on the basis of race. *See, e.g.*, *Miller*, 515 U.S. at 913. The plaintiffs cannot make that showing because "the 2013 Legislature did not draw the challenged districts in Plan C235." J.S. App. 34a.

Even if the 2011 Legislature's intent mattered, moreover, several significant problems would remain with the plaintiffs' argument that the Legislature lacked a strong basis in evidence for drawing CD35 as it did because it failed to establish that *Gingles*' prerequisites were met in the Austin area. Mot. 30. First, that argument implies that a State has no discretion in determining how to comply with the VRA. But this Court rejected that theory in *Bartlett v. Strickland* when it held that "§ 2 allows States to choose their own method of complying with the Voting Rights Act." 556 U.S. 1, 23 (2009). The plaintiffs admit that VRA §2 required seven minority-opportunity districts in South/Central/West Texas, and they do not dispute that CD35 covers that area. Mot. 30. Nevertheless, they argue that the State could not adopt "this particular version" of CD35 unless it proved that §2 required it. Mot. 30. That principle has no basis in law and would choke off what little breathing

room States have in balancing the competing demands of the Constitution and the VRA.

Second, the plaintiffs' assertion that the State may not draw a minority-opportunity district unless it proves that §2 requires the precise lines selected would turn *Gingles* on its head. *Gingles* is a guard against vote dilution, *see Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), not a rigid limit on the State's ability to draw minority-opportunity districts. The plaintiffs do not argue that CD35 deprives minority voters in Travis County of "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44 (quotation marks omitted). Nor could they, as CD35 undisputedly is a minority-opportunity district.

Third, the plaintiffs' argument erroneously focuses on only a small portion of CD35, not the entire district, as this Court's precedent requires. *See Bethune-Hill*, 137 S. Ct. at 800.

CONCLUSION

The Court should deny the plaintiffs' motion and note probable jurisdiction, or summarily reverse the district court's order invalidating Plan C235.

Respectfully submitted.

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

DECEMBER 2017